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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-858
No. 74-859

CURTIS CIRCULATION COMPANY, et al.,

Appellants,

-v.-

BERT RANDOLPH SUGAR and
WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
of New York City
Civil Division

JOHN E. KIRKLIN
Director of Litigation
GUY W. GERMANO,
Of Counsel
The Legal Aid Society
of New York City
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011

Counsel for Amicus Curiae

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OCTOBER TERM, 1975

No. 74-858
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CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, HUGH L. CAREY, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT AND GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Appellants,

-v.-

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES, AND STATEMENT OF INTEREST OF THE AMICUS

The Legal Aid Society of New York City respectfully moves the Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of appellees, Bert Randolph Sugar and Wrestling Revue, Inc., by reason of The Society's substantial interest in the outcome of this case and its ability to assist this Court in the resolution of the constitutional issue presented herein.

(1) Movant The Legal Aid Society of New York City is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate means to employ other counsel.

(2) The question presented in this case concerning the constitutionality of New York's pre-judgment property attachment procedure, contained in Article 62 of the New York Civil Practice Law and Rules, is of basic importance to hundreds of indigent New York City residents whom The Society serves. A significant number of the Society's clients are low-income persons whose wages or public assistance benefits, deposited in bank accounts and often representing the very means of their subsistence, are summarily seized, often wrongfully, pursuant to the procedures challenged herein. The Society therefore has an obvious and immediate interest in the issue before the Court in this case.

(3) The Society has in the past liti-

gated cases seeking to insure that summary creditor pre-judgment remedies fully comport with the requirements of procedural due process. E.g., Hernandez v. European Auto Collision, Inc., 487 F. 2d 378 (2 Cir., 1973); Blye v. Globe-Wernicke Realty Corp., 33 N.Y.2d 15 (1973).

(4) Because of its long experience with the operation and effect of the New York pre-judgment property attachment procedure The Society is in a unique position to analyze the state law questions which are crucial to the resolution of the constitutional question presented herein. In particular The Society seeks to assist the Court in its determination of the focal issue here of the scope and nature of the post-attachment hearing under section 6223 of the New York Civil Practice

Law and Rules, as construed by the New York State Courts.

(5) Counsel for appellees has consented to the filing of this brief amicus curiae. This motion is filed because counsel for each of the appellants has refused consent.

WHEREFORE, movants pray that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
of New York City
Civil Division

JOHN E. KIRKLIN
Director of Litigation
GUY W. GERMANO,
Of Counsel
The Legal Aid Society
of New York City
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY IN SUPPORT OF APPELLEES

STATEMENT OF THE CASE

This case presents the question of the constitutionality, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, of the New York pre-judgment property attachment procedure contained in Article 62 of the New York Civil Practice Law and Rules (hereinafter "CPLR"), section 6201 et seq.

The factual background which led to the institution of this action is fully set forth in the opinions below in this case. 377 F. Supp. 1056, 1057 and 383 F. Supp. 643, 644-5. Briefly, Curtis Circulation Company moved in New York State Supreme

Court, New York County, on grounds of alleged fraud and a cause of action for breach of contract, for an order of attachment directing the sheriff to levy on any property of Bert Randolph Sugar or of Champion Sports Publishing, Inc., or Wrestling Revue, Inc., both corporations controlled by Sugar. Without notice to the alleged debtors and prior to the filing of a complaint, a New York State Supreme Court Justice granted the order of attachment pursuant to CPLR Article 62 and the sheriff proceeded to levy on sums owed to Sugar and Wrestling.

Sugar and Wrestling then filed this action under 42 U.S.C. §1983 in Federal Court challenging the constitutionality of the New York pre-judgment property attachment procedure contained in CPLR Article

62, and, in particular, CPLR §§6201 (4), (5) and (8), which authorize ex parte attachment on the grounds of the debtor's alleged fraud. District Judge Lasker found that the complaint presented a substantial constitutional question and granted plaintiffs' motion to convene a three-judge court. 377 F. Supp. 1063 (S.D.N.Y., 1974). The three-judge court thereupon declared the challenged provisions of the New York pre-judgment property attachment statute unconstitutional as violative of due process of law and enjoined their enforcement, primarily because they failed to guarantee the debtor a constitutionally adequate opportunity to vacate the ex parte attachment. 383 F. Supp. 643 (S.D.N.Y., 1974).

Defendants appealed to this Court from

the judgment of the three-judge court pursuant to 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on April 14, 1975.

SUMMARY OF ARGUMENT

Fundamental principles of procedural due process require that summary pre-judgment property attachment procedures strike a fair balance between the conflicting interests of creditor and debtor. How that balance is struck and precisely what procedural safeguards are required by due process in a given case are basically a function of the risk of error inherent in the particular ex parte attachment procedure, evaluated in light of the benefit to the creditor and the burden on the debtor of a pre-judgment taking of the property.

The principles established by this Court in its recent constitutional decisions in the area of creditor pre-judgment remedies dictate that, in order to strike the con-

stitutionally required balance, the New York pre-judgment attachment statute must guarantee to the debtor the prompt return of his property, initially seized ex parte, unless the creditor proves the grounds of the attachment at a genuinely adversary hearing.

A careful analysis of New York law plainly discloses that the post-attachment hearing afforded by the New York pre-judgment property attachment statute, far from measuring up to the due process requirement of a guaranteed meaningful opportunity for the debtor to regain possession of his seized property, is basically a sham hearing which overwhelmingly favors the creditor's interest. This fundamental due process deficiency in the New York procedure renders it patently unconstitutional.

ARGUMENT

THE CHALLENGED PROVISIONS OF NEW YORK'S PRE-JUDGMENT PROPERTY ATTACHMENT STATUTE ARE VIOLATIVE OF DUE PROCESS FOR FAILURE TO GUARANTEE THE DEBTOR THE RETURN OF HIS PROPERTY, SEIZED EX PARTE, UNLESS THE CREDITOR PROVES THE GROUNDS FOR THE ATTACHMENT.

A. At A Minimum Due Process Requires That An Ex Parte Attachment Under A General Pre-Judgment Property Attachment Statute Be Promptly Vacated Unless The Creditor Proves At An Adversary Hearing The Grounds For The Attachment.

Pre-judgment property attachment and garnishment remedies serve legitimate state interests in facilitating a creditor's recovery on a potential judgment by ensuring that the alleged debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim. However, inherent in a pre-judgment property

attachment obtained on the creditor's ex parte application is the substantial risk of a wrongful or unnecessary taking of the debtor's property, since the attachment occurs without prior notice to the debtor and the opportunity for him to defend. Fundamental principles of procedural due process require that a pre-judgment attachment procedure must effect a fair accommodation of the conflicting interests of the creditor and debtor, and, in particular, must contain procedural safeguards adequate to guard against an erroneous use of an ex parte pre-judgment remedy.

As the issues made relevant to the attachment become broader and more complex, the risk of a wrongful taking from an ex parte attachment increases correspondingly. The absence of any pre-existing creditor

interest in the particular property seized also enhances the likelihood of the abuse of the pre-judgment remedy by a creditor without a valid claim. In addition, the creditor's need for a pre-judgment taking is substantially diminished where he lacks a prior interest in the property to be seized and where there is little danger that the debtor will alienate or waste the property pending a hearing. Finally, the greater the level of deprivation to the debtor which may flow from a pre-judgment property seizure, the less tolerance there should be of the risk of an erroneous taking.

A careful weighing and balancing of these several factors bearing on the risk of a wrongful taking and on the relative creditor benefit and debtor burden of a

pre-judgment property seizure have guided this Court in recent years in passing on the constitutionality of summary pre-judgment remedies. Thus this Court has held that due process requires notice and an opportunity for the debtor to be heard prior to the garnishment of a significant portion of a person's wages, because of the potentially devastating impact upon a wage earner's family of a wage garnishment, the likelihood of error arising from fraudulent creditor claims, the creditor's lack of a pre-existing interest in the property seized, and the minimal risk of leaving the wages in the debtor's possession. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Replevin or sequestration procedures permitting an installment seller to summarily repossess goods

which he has sold and in which he has a substantial pre-existing property interest have presented different problems. There the creditor's interest in and need for ex parte pre-judgment seizure are strong, since there will be an inevitable deterioration in the value of the creditor's security if the buyer remains in possession of the goods and uses them pending trial and since there is a real risk that if given prior notice of a hearing the buyer will conceal or transfer the merchandise to the damage of the seller. On the other hand, the impact on the debtor of loss of particular items of household furniture is potentially far less severe than that flowing from deprivation of wages. With these considerations in mind, this Court has held that due process requires pre-seizure

notice and opportunity for the debtor to be heard in circumstances where broad and relatively complex issues are made relevant to the replevin, the replevin procedure fails to require any judicial supervision or control over the property seizure, and there is no guarantee that an adversary hearing will occur relatively promptly, if at all, after the seizure. Fuentes v. Shevin, 407 U.S. 67 (1972). On the other hand, an ex parte replevin procedure satisfies due process requirements in cases where the issues made relevant to the replevin are narrowly confined and relatively uncomplicated, the ex parte seizure is initially subject to strict judicial control, and the seizure is followed promptly by a guaranteed adversary hearing and the return of the property to the

debtor unless the creditor proves the grounds for the replevin. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Finally, a general pre-judgment property attachment procedure, which permits a creditor, on ex parte application, to seize property in which he has no pre-existing interest and the loss of which may cause serious hardship to the debtor, must at least satisfy the Mitchell requirements of careful judicial control over the initial seizure and the guaranteed return of the property to the debtor unless the creditor proves the grounds for the attachment at a prompt post-attachment adversary hearing. North Georgia Finishing Co. v. Di-Chem, _____ U.S. _____, 42 L.Ed.2d 751 (1975).

A careful assessment of the risk of error, limited creditor interest, and

potentially severe debtor hardship inherent in the procedure compels the conclusion that the New York pre-judgment attachment statute in issue here is fatally deficient in fundamental due process safeguards for the debtor. The New York attachment procedure permits summary seizure, on the creditor's ex parte application, of property in which the creditor has no pre-existing interest. Because of the broad reach of the statute, it potentially subjects a debtor to the risk that he will be summarily deprived of assets essential to the basic survival of himself and his family. Wages may not be attached, but once in the hands of the debtor and converted into, for example, a bank deposit, they become immediately susceptible to seizure. Finally, the issues of fraud

and deceit which are made relevant by CPLR §§6201 (4), (5) and (8) to the pre-judgment attachment are neither uncomplicated nor narrowly confined, but rather, implicating as they do subjective elements of motive and intent, inherently involve factual and credibility determinations which lend themselves only to full adversarial resolution.

In view of the complexity of the issues made relevant to the attachment and the absence of any pre-existing creditor interest in the property attached, it is evident that the risk that the initial ex parte attachment will be erroneous is substantial. Further, the lack of any prior creditor interest in the attached property, together with the potentially severe impact of the attachment upon the debtor and his

family, will in many cases make the creditor's need for pre-judgment attachment minimal as compared to the debtor's interest in avoiding even temporary deprivation of his property. In all of these respects, the New York general pre-judgment property statute stands in sharp contrast to the Louisiana sequestration statute sustained in Mitchell, where the issues were simple, the creditor's pre-existing property interest substantial, and the potential impact on the debtor relatively slight. Accordingly, the constitutional requirement that the initial advantage obtained by the creditor through ex parte attachment be effectively counter-balanced by the guarantee to the debtor of a prompt and adequate post-seizure adversary

hearing is even more compelling in this case than it was in Mitchell. If initial ex parte attachment, without prior notice and opportunity for the debtor to be heard, is constitutionally permissible here, then due process at least requires that the debtor be entitled to the return of his seized property unless the creditor successfully proves the grounds for the attachment at a prompt post-attachment adversary hearing. Upon analysis it is clear that, as the three-judge court concluded below, the New York procedure falls woefully short of satisfying this fundamental due process requirement.

B. The Post-Attachment Hearing Afforded By The New York Pre-Judgment Property Attachment Procedure Is Constitutionally Deficient.

The Louisiana sequestration statute in

issue in Mitchell specifically provided on its face that the debtor could by motion obtain the dissolution of the attachment unless the creditor proved the grounds upon which it was obtained (Article 3506). Standing in sharp contrast to that provision is the section of the New York pre-judgment property attachment statute which provides for the vacating of the attachment upon the debtor's motion. Aside from narrowly providing that the attachment shall be vacated where a non-resident debtor has appeared and shown that he has adequate assets available to render the attachment unnecessary to the creditor's security,[1] CPLR §6223 is barren of any indication of

1. This provision was recently added to CPLR section 6223 to supply a limited ground for the vacatur of an attachment secured primarily for jurisdictional purposes. 7A Weinstein-
(continued)

what must be established, and by whom, to justify continuation or vacatur of the attachment. In leaving this void to be filled by decisional law, the statute inevitably commits to the discretion of the state courts the crucial decision as to the showing required for vacatur of an attachment and as to who bears the burden of proof. Such a legislative delegation of unbounded discretion to the courts plainly incurs the risk that the decisional law will fail to guarantee the debtor that meaningful opportunity to secure the return of property seized ex parte which due process requires.

The danger created by the statute that the post-attachment hearing may be construed

(continued from p. 19)
Korn-Miller, New York Civil Practice, §6223.16 (1974); 3 N.Y. Adv. Comm. Rep., 358 (1959); (continued)

by the New York State courts to afford the debtor far less protection than is constitutionally required to counterbalance the initial ex parte attachment is strikingly confirmed by a careful examination of state court decisions extending over the past seventy years. Upon analysis, it is clear that the §6223 post-attachment hearing, as construed by the New York State courts, occasions only the court's re-examination of the creditor's papers upon which the initial ex parte attachment was obtained to determine whether they, as supplemented by any additional papers the creditor chooses to submit, continue to justify the

(continued from p. 20)
Zieberg v. Robosonics, Inc., 43 Misc.2d 134, 250 N.Y.S. 2d 368 (App. Term, 1 Dept., 1964).

attachment, without regard to the debtor's attempts to put into issue the creditor's allegations. Stripped of niceties, the §6223 post-attachment hearing is really no more a test of the validity of the creditor's claimed grounds for attachment, and no more a safeguard against the wrongful taking of the debtor's property, than was the initial ex pa te attachment.

1. The Creditor's "Burden" of Showing a Prima Facie Case.

By statute New York has required as the grounds sufficient to justify a pre-judgment property attachment under CPLR Article 62 that the plaintiff-creditor show, on ex parte application, [2] a cause of action,

2. Although CPLR §6211 on its face only permits and does not mandate ex parte attachment, amicus' exhaustive research of New York decisions has disclosed not a single case where the court actually required notice to the debtor prior to the attachment.

one or more grounds for attachment -- here the defendant-debtor's fraud or fraudulent intent -- and the amount demanded in excess of known counterclaims. CPLR §§6212(a), 6201(4), (5) and (8). In order to successfully resist the debtor's §6223 motion to vacate the attachment because of the absence of a cause of action or a ground for attachment, the creditor need only sustain again the burden which was required of him in obtaining the initial attachment, that is, of making out a prima facie case. American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); Zenith Bathing Pavilion v. Fair Oaks S.S. Corp., 240 N.Y. 307, 312, 148 N.E. 532 (1925); Stines v. Hertz Corp., 22 A.D.2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965);

Waterman-Bic Pen Corp. v. Waterman Pen Co., 8 A.D. 2d 378, 187 N.Y.S. 2d 872 (1 Dept., 1959); AMF Incorporated v. Algo Distributors Ltd.,(App. Div., 2 Dept., June 9, 1975) N.Y.L.J., p.1, col.7, June 23, 1975.[3] To make out a prima facie

3. Godbout v. Irwin, 272 App. Div. 1020, 73 N.Y.S. 2d 565 (2 Dept., 1947); Goldmark v. Magnolia Metal Co., 28 App. Div. 264, 266, 51 N.Y.S. 68 (1 Dept., 1898) aff'd. 170 N.Y. 579, 63 N.E. 1117 (1902); Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 1033, 29 N.Y.S. 2d 747(Sup. Ct., N.Y. Cty., 1941) aff'd. 263 App. Div. 712 (1 Dept., 1941); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965); Atlantic Raw Materials, Inc. v. Almarex Products,154 N.Y.S. 2d 998, 1000 (Sup. Ct., N.Y. Cty., 1950); Banco Agricola v. Jiminez Export, 97 N.Y.S. 2d 437, 439-40 (Sup. Ct., N.Y. Cty., 1950); ECCO High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S. 2d 610, 612 (Sup. Ct., N.Y. Cty., 1948), aff'd. 85 N.Y.S. 2d 304 (App. Div., 1 Dept., 1948); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); Aerotrade, Inc. v. Banque National de la Republique D'Haiti, 376 F. Supp. 1286, 1287 (S.D.N.Y., 1974); Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F. Supp. 64, 66 (S.D.N.Y., 1968).

case the creditor is required only to present papers which "contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated." (emphasis supplied). Krellberg v. Gregory, 10 A.D. 2d 824, 199 N.Y.S. 2d 152 (1 Dept., 1960).[4]

4. Stines v. Hertz Corp., 22 A.D. 2d 823, (2 Dept. 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 662, 664, 166 N.Y.S. 92 (1 Dept. 1917); Pfaltz & Bauer, Inc. v. Wiener, 181 App. Div. 793, 794, 169 N.Y.S. 223 (1 Dept. 1918); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151, 288 N.Y.S. 944 (1 Dept. 1936); Banco Agricola v. Jiminez Export, 97 N.Y.S. 2d 437, 439-40 (Sup. Ct., N.Y. Cty., 1950); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); ECCO High Frequency Corp. v. Amtorg Trading Corp., 81 N.Y.S. 2d 610 (Sup. Ct., N.Y. Cty., 1948), aff'd. 85 N.Y.S. 2d 304 (App. Div. 1 Dept., 1948).

If the creditor makes out a prima facie case, and unless the creditor's papers "clearly establish that the plaintiff must ultimately be defeated,"(Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965)), the debtor's motion to vacate must be denied. Wulfsohn v. Russian Republic, 234 N.Y. 372, 377, 138 N.E. 24 (1923); Zenith Bathing Pavillion v. Fair Oaks SS. Corp., 240 N.Y. 307, 311, 148 N.E. 532 (1925); American Reserve Ins., Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); California Packing Corp. v. Kelly Storage & Dist. Co., 228 N.Y. 49, 53-54, 126 N.E. 269 (1920); Lamborn v. Lake Shore Banking & Trust Co., 231 N.Y. 616, 132 N.E. 911 (1921).[5] Finally, only those counterclaims of the defendant which

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5. AMF Incorporated v. ALGO Distributors Ltd., (App. Div., 2 Dept., June 9, 1975), N.Y.L.J., p.1, Col.7, June 23, 1975; Freedman v. Wilson Securities Corp., 31 A.D. 2d 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Waterman-Bic Pen Corp. v. Waterman Pen Co. Ltd., 8 A.D. 2d 378, 379, 187 N.Y.S. 2d 872 (1 Dept., 1959); Godbout v. Irwin, 272 App. Div. 1020, 73 N.Y.S. 2d 565 (2 Dept., 1947); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151, 288 N.Y.S. 944 (1 Dept., 1936); Bard-Packer Co.,Inc. v. Dictograph Products Co., Inc., 258 App. Div. 638, 17 N.Y.S. 2d 588 (1 Dept., 1940); Severnoe Securities Corp. v. Westminster Bank, Ltd., 214 App. Div. 14, 210 N.Y.S. 629 (2 Dept., 1925); Romeo v. Garofalo, 25 App. Div. 191, 49 N.Y.S. 114 (1 Dept., 1898); Marshall v. Knight, (Sup. Ct., N.Y. Cty., Dec. 23, 1974), N.Y.L.J., p.2, Col.3, Dec. 24, 1974; Mirabella v. Banco Ind., Argentina, 38 Misc. 2d 128, 136 237 N.Y.S. 2d 499 (Sup. Ct., N.Y. Cty., 1963); Compania Panamena v. Inter-Union Lines, 17 Misc. 2d 497, 187 N.Y.S. 2d 449 (Sup. Ct., N.Y. Cty., 1959); Montenegro v. Roxas, 141 N.Y.S. 2d 681, 683 (Sup. Ct., N.Y. Cty., 1955); Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 1033, 29 N.Y.S. 2d 747 (Sup. Ct., N.Y. Cty., 1941), aff'd 263 App. Div. 712, 31 N.Y.S. 2d 670 (1 Dept., 1941);American Jerex Co. v. Universal Alum. Extrusion, Inc., 340 F. Supp. 524, 529, (E.D.N.Y., 1972); Chase Manhattan Bank (Nat. Assoc.) v. Banque Intra, S.A. 274 F. Supp. 496 (S.D.N.Y., 1967); Marklin v. Drew

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"plaintiff is willing to concede as just" are considered in measuring the amount demanded from the defendant under §6212 (a). American Jerex Co. v. Universal Alum. Extrusions, Inc., 340 F. Supp. 524, 529 (E.D.N.Y., 1972); Freedman v. Wilson Securities Corp., 31 A.D. 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Bard-Parker, Co. Inc. v. Dictograph Products Co. Inc., 258 App. Div. 638, 640, 17 N.Y.S. 2d 588 (1 Dept., 1940); Marshall v. Knight, (Sup. Ct., N.Y. Cty., Dec. 23, 1974), N.Y.L.J., P.2, Col.3, Dec. 24, 1974.

(continued) Properties Corp., 280 F. Supp. 176, 177 (S.D.N.Y., 1967); Wilcox v. Richmond, Fredericksburg & Potomac R.R. Co., 270 F. Supp. 454, 458 (S.D.N.Y., 1967).

Given this extremely lenient standard of review of the creditor's alleged grounds for attachment, it is rare that the creditor's papers will be so patently defective as to require the vacatur of the attachment on the debtor's §6223 motion. The attachment will be vacated only where the allegations in the creditor's papers relating to his cause of action and the debtor's alleged fraud are based on no evidentiary facts whatsoever (Martin Enterprises Inc. v. M.S. Kaplan Co., 45 A.D. 2d 883, 385 N.Y.S. 2d 13 (2 Dept., 1974); Miller Bros. Constr. Co. Inc. v. Thew Shovel Co., 248 App. Div. 150, 151 (1 Dept., 1936)), on pure hearsay (Hart v. Page Manufacturing Co., 187 App. Div. 296, 175 N.Y.S. 502 (2 Dept., 1919)), on mere rumor, suspicion, or conjecture (Zenith Bathing Pavillion v. Fair

Oaks S.S. Corp., 240 N.Y. 307, 311, 148 N.E. 532 (1925); Maitrejean v. Levon Properties, 45 A.D. 2d 1020, 358 N.Y.S. 2d 203 (2 Dept., 1974); Eaton Factors Co. v. Double Eagle Corp., 17 A.D. 2d 135, 136, 232 N.Y.S. 2d 901 (1 Dept., 1962); Nolan v. Workman Co., Inc., 146 Misc. 99, 261 N.Y.S. 534 (Sup. Ct., Queens Cty., 1932)), on mere "conclusory words " (Richman v. Richman, 41 A.D. 2d 993, 994, 344 N.Y.S. 2d 52 (3 Dept., 1973)), or on but a "scintilla of proof " (Macmillan, Inc. v. Hafner, 42 A.D. 2d 533, 344 N.Y.S. 2d 729 (1 Dept., 1973)). In short, the creditor "proves" his prima facie case if he can plead it "with a straight face" and can make some allegations of evidentiary value which show that the facts upon which he relies might be true. Reitmeister v. Reitmeister,

273 App. Div. 652, 79 N.Y.S. 2d 22 (1 Dept., 1948); Buell v. Van Camp, 119 N.Y. 160, 165, 23 N.E. 538 (1890); Rives v. Zeiss - Stiftung, 259 App. Div. 1051, 22 N.Y.S. 2d 206 (2 Dept., 1940); Hart v. Page Manufacturing Co., 187 App. Div. 296, 297, 175 N.Y.S. 502 (2 Dept., 1919). In his task of making out his prima facie case and avoiding the risk that his papers may be found to be hopelessly defective on their face, the creditor is generously assisted by the requirement that "the truth of all the facts stated must be assumed," (United States v. Brown, 247 N.Y. 211, 217, 160 N.E. 13 (1928); See also Zale Jewelry Co. v. Laine, 37 Misc. 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct., N.Y. Cty., 1962)), and that his papers "must be liberally construed

in favor of the plaintiff and every legitimate inference from the facts shown must be drawn in his favor." (Coakley v. Rickard, 136 App. Div. 489, 490, 121 N.Y.S. 280 (1 Dept., 1910).[6]

6. United States v. Brown, 247 N.Y. 211, 217, 160 N.E. 13 (1928); Maw v. Butler & Smith, Inc., 226 N.Y.S. 2d 649, 650 (App. Term, 1 Dept., 1962); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965); Zale Jewelry Co. v. Laine, 37 Misc. 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct., N.Y. Cty., 1962); ECCO High Frequency Corp. v. Amtory Trading Corp., 81 N.Y.S. 2d 610 (Sup. Ct., N.Y. Cty., 1948), aff'd.,85 N.Y.S. 2d 304 (App. Div. 1 Dept., 1948); Distillers Factors Corp. v. Country Distillers Products, Inc., 189 Misc. 497, 71 N.Y.S. 2d 165 (Sup. Ct., N.Y. Cty., 1947); Montenegro v. Roxas, 141 N.Y.S. 2d 681, 683 (Sup. Ct., N.Y. Cty., 1955); Lepow v. Cervo Export Corp., 82 N.Y.S. 2d 423, 424 (Sup. Ct., N.Y. Cty., 1948); Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 662, 166 N.Y.S. 92 (1 Dept., 1917); Stewart v. Lyman, 62 App. Div. 182, 70 N.Y.S. 936 (1 Dept., 1901); Worldwide Carriers, Ltd. v. Aris Steam Ship Co., 301 F. Supp. 64 (S.D.N.Y., 1968); Chase Manhattan Bank (Nat. Ass'n.) v. Banque Intra, S.A., 274 F. Supp. 496, 499 (S.D.N.Y. 1967).

Indeed, the burden which the creditor must meet to sustain the attachment against a §6223 motion is so slight that, after examining the New York precedents, Judge Learned Hand observed that the creditor's right to a continuing attachment is scrutinized "with less jealousy than upon a motion to dismiss the complaint for insufficiency in law." Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 248 (2 Cir., 1947) cert. denied 332 U.S. 772 (1947). Similarly, the New York Appellate Division, First Department has held:

> Upon a motion to vacate an attachment, the sufficiency of the complaint is not to be discussed and treated with the same elaboration as when the question of sufficiency is presented upon a demurrer. Undoubtedly it is the duty of the court to examine the pleading with a view to seeing if it is frivolous or so barren of substantial averments that no reasonable arguments can be urged in its support. But it would

> add greatly to the labors of the judges at Special Term if, upon every motion, the sufficiency of pleading could be brought in question and should then be disposed of with same elaboration as upon a demurrer. Goldmark v. Magnolia Metal Co., 28 App. Div. 264, 271, 51 N.Y.S. 68 (1 Dept., 1898), aff'd. 170 N.Y. 579, 63 N.E. 1117 (1902).

Thus, the "burden" shouldered by the creditor in order to defeat a §6223 motion to vacate is so slight that it provides no meaningful test of even the probable validity of the grounds of the attachment, that is, of the creditor's cause of action and, here, the debtor's alleged fraud. It unquestionably falls far short of the burden explicitly placed upon the creditor by the Louisiana sequestration statute of proving the grounds of the attachment. Accord, Vath v. Israel, 80 Misc. 2d 759, 761, 364 N.Y.S. 2d 97 (Sup. Ct., Queens Cty., 1975). But if the creditor's burden of showing a

prima facie case is innocuously light, the debtor's burden of proof on the §6223 motion is unbearably heavy, if not practically insurmountable.

2. The Debtor's Burden of Proving That the Creditor's Case Must Inevitably Fail.

If, on the §6223 motion, the court is satisfied that the creditor's papers continue to make out the prima facie case initially necessary to obtain the attachment ex parte, the burden rests squarely on the debtor seeking vacatur to prove, indeed to "clearly establish," that "the plaintiff must ultimately be defeated" on the merits of his underlying claim or on his fraud allegations. [7] Cocoline Choc. v.

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7. The debtor's problems in making and prevailing on a post-attachment motion to vacate are compounded by the delay permitted the creditor in serving the summons and complaint. While they must be filed within 10 days after the granting of an order of attachment,

Hillside Enterprises, 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444 (Sup. Ct., Kings Cty., 1965).[8] If this were not a hopeless enough task for the debtor, the

(continued fn. 7) CPLR §6212 (c), they need not be served upon the debtor until sixty days after the order is granted. CPLR §6213.

8. American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E. 2d 425 (1948); Waterman - Bic Pen Corp. v. Waterman Pen Co., 8 A.D. 2d 378, 187 N.Y.S. 2d 872 (1 Dept., 1954); AMF Incorporated v. ALGO Distributors, Ltd., (App. Div. 2 Dept., June 9, 1975) N.Y. L.J., P.1, Col.7, June 23, 1975; Auerbach v. Grand National Pictures, Ltd., 176 Misc. 1031, 29 N.Y.S. 2d 747 (Sup. Ct ., N.Y. Cty., 1941), aff'd. 263 App. Div. 712, 31 N.Y.S. 2d 670 (1 Dept., 1941); American Jerex Co. v. Universal Alum. Extrusions, Inc., 340 F. Supp. 524, 558 (E.D.N.Y., 1972); B.B. Weit Printing Co. v. Frances Denmey, Inc., 300 F. Supp. 405, 408 (S.D.N.Y., 1969); World-Wide Carriers, Ltd., v. Aris Steamship Co. Ltd., 301 F. Supp. 64, 67 (S.D.N.Y.,1968); Marklin v. Drew Properties Corp., 280 F. Supp. 176, 179 (S.D.N.Y.,1967); Weinstein-Korn-Miller, New York Civil Practice, §§6223.05, 6223.11, Pp. 62-209, 62-219 (1974).

court's determination of whether the plaintiff "must ultimately fail" is made exclusively with reference to the creditor's papers, without regard to any contrary factual evidence presented by the debtor. Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Freedman v. Wilson Securities Corp., 31 A.D. 2d 627, 628, 295 N.Y.S. 2d 789 (1 Dept., 1968); Zale Jewelry Co. v. Laine, 37 Misc., 2d 39, 40, 236 N.Y.S. 2d 995 (Sup. Ct.,N.Y. Cty., 1962).[9]

9. Compania Panamena v. Inter-Union Lines, 17 Misc. 2d 497, 187 N.Y.S. 2d 449 (Sup. Ct., N.Y. Cty., 1959); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 248 (2 Cir., 1947), cert. denied 332 U.S. 772 (1947).

Indeed, the New York courts have viewed the existence of a factual conflict between creditor and debtor, created by the debtor's submission of contradictory affidavits and exhibits, as merely evidence that the creditor has at least made out a prima facie case sufficient to justify the attachment. Thus, the Court in Mirabella v. Banco Ind., Argentina, 38 Misc. 2d 128, 136, 237 N.Y.S. 2d 499 (Sup. Ct., N.Y. Cty., 1963), reasoned as follows:

> I cannot determine from the complaint and the conflicting affidavits that plaintiff cannot ultimately succeed. Since the warrant of attachment may be vacated only if the papers clearly establish that plaintiff must ultimately fail (American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325; Bard-Parker Co. v. Dictograph Prods. Co., 258 App. Div. 638, 640; Compania Panamena v. International Union Lines, 17 Misc. 2d 497, 498), this motion must be denied.
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> In short, the debtor in attempting to

sustain his extraordinarily heavy burden of proof can only hope, at best, to assist the court in examining the creditor's papers for deficiencies which are self-defeating on their face and which will inevitably condemn the creditor's case to ultimate failure. District Judge Motley made the point in language which is actually restrained in view of the heavy odds against the debtor seeking to vacate an attachment:

> "In motions of this type, defendant has formidable obstacles to surmount - not only must defendant carry the burden of showing that plaintiff must ultimately fail, 7 Weinstein, Korn & Miller, New York Civil Practice, ¶ 6223.05 (1966), but also 'the court must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the stated facts.' Cocoline Chocolate Co. v. Hillside Enterprises, Inc., 45 Misc. 2d 594, 596, 257 N.Y.S. 2d 444, 446 (Sup. Ct. Kings Co.,1965). See also United Steel Warehouse Corp. v. Del-Penn Steel Company, 212 N.Y.S. 2d 157 (Sup. Ct. Kings Co. 1961)." Chase Manhattan

Bank (Nat. Ass'n.) v. Banque Intra, S.A., 274 F. Supp. 496, 499(S.D.N.Y., 1967).

Even the debtor who successfully sustains his heavy burden of proving that the creditor's cause of action or fraud allegation is so hopelessly defective as to inevitably fail is not necessarily rewarded with the vacatur of the attachment. Under such circumstances the statute conveniently extends to the creditor a final opportunity to rehabilitate his papers by guaranteeing him "a reasonable opportunity to correct any defect." CPLR §6223. See Krellberg v. Gregory, 10 A.D. 2d 824, 199 N.Y.S. 2d 152 (1 Dept.,1960); Stines v. Hertz Corp., 22 A.D. 2d 823, 254 N.Y.S. 2d 903 (2 Dept., 1964), aff'd. 16 N.Y. 2d 605, 261 N.Y.S. 2d 59 (1965); Cocoline Choc. v. Hillside Enterprises, 45 Misc. 2d 594, 595, 257 N.Y.S. 2d 444

(Sup. Ct., Kings Cty., 1965); Worldwide Carriers, Ltd. v. Aris Steamship, Co. Ltd., 301 F. Supp. 64, 66 (S.D.N.Y. 1968).

Thus it is clear that far from entitling the debtor to a post-attachment adversary hearing at which the creditor must prove the grounds of the attachment, or even the probable validity thereof, CPLR §6223 guarantees the debtor nothing but the empty promise of a hearing which is, at bottom, nothing more than the occasion for the court's re-examination of the untested allegations of the creditor to determine whether they continue to make out a prima facie case. Only in a purely formal sense can the §6223 hearing be called "adversary", and in no practical sense can it be said that the creditor bears any meaningful burden of proving even the pro-

bable validity of the grounds for the attachment. While the debtor is given the nominal opportunity to be heard, nonetheless, no matter how loudly or forcefully he speaks he cannot, even by genuinely putting into issue the unilateral assertions of the creditor, succeed in undoing the attachment. Only the creditor's own papers, by their inherent deficiencies, can defeat themselves.

CONCLUSION

Because of these fundamental deficiencies, the New York post-attachment hearing fails grievously to serve its constitutionally necessary function of restoring a modicum of balance and fairness to a procedure which, with substantial risk of error, allows the creditor to obtain an attachment of the debtor's property ex parte. Especially in

view of the complexity of the issues made relevant to the attachment by the New York statute -- the debtor's fraud and the merits of the creditor's underlying claim -- the narrow and truncated §6223 hearing plainly fails to significantly minimize the dangers of a wrongful taking inherent in the initial ex parte attachment. The risk of error thus perpetuated through the inadequacies of the post-attachment hearing is especially intolerable in view of the total absence of a prior creditor interest in the property seized and the potentially devastating impact on the debtor of the property deprivation permitted by the sweep of Article 62. Accordingly, the New York pre-judgment property attachment procedure is patently unconstitutional for failure to effect that

fair accommodation of the conflicting interests of creditor and debtor which due process requires, and the judgment of the three-judge court below should be affirmed.

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Respectfully submitted,

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
of New York City
Civil Division

JOHN E. KIRKLIN
Director of Litigation
GUY W. GERMANO,
Of Counsel
The Legal Aid Society
of New York City
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011